

DUPLICATE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANTONIO HECTOR MILLAN-GARCIA,
Appellant,

-VS-

UNITED STATES OF AMERICA
Appellee,

No. 22025 ✓

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court, Southern District, Central Division, denying petitioner naturalization as a citizen of the United States. The jurisdiction under which the court denied citizenship to petitioner is Title 8, U.S.C., Sec. 1421, et seq. The jurisdiction of this Court is invoked under Title 28, U.S.C., Secs. 1291-1294.

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HISTORY OF THE CASE

Petitioner is a native and citizen of the Republic of Mexico who entered this country with his mother in 1949 at San Ysidro, California when thirteen years of age. His certificate of admission with his mother executed pursuant to his entry, indicated the purpose of his entry as business and pleasure of one day.

The record discloses that his mother entered as a permanent resident. Petitioner's residence in the United States has continued to date. He was reared and educated here.

Arriving at military age, he enlisted in the Army of the United States and served in an active status from March 28, 1955 to April 1, 1957, and subsequently was honorably discharged. From April 2, 1957 to April 17, 1963 he was transferred to and served in the United States Reserves, from which he received an honorable discharge.

On August 12, 1963 petitioner filed with Immigration and Naturalization Service at Los Angeles his "Application To File Petition For Naturalization."

On October 24, 1963 a "certification of military or naval service," dated August 22, 1963 executed by J. C. Lambert, Major General of the United States Army, certifying petitioner's active military service and honorable discharge was filed with the Immigration Service.

The Immigration file contains a statement of

1 advice dated August 31, 1964 from the Naturalization Exam-
2 iner "B. H. Simpson" to petitioner that "no person shall be
3 naturalized against whom there is outstanding a finding of
4 deportability," and that "no petition for naturalization
5 shall be finally heard by a Naturalization court if there is
6 pending against petitioner a deportation proceeding."

7 On August 31, 1964 petitioner appeared for inter-
8 view. The Immigration file contains the following notation:
9 "Petitioner insists on filing." The file contains the fol-
10 lowing written memorandum:

11 "MEMORANDUM FOR THE FILE

January 23, 1964

12 Re: Antonio Hector MILLAN-Garcia

13 The facts in this case do not warrant the exercise
14 of my discretionary authority based on OI 242.1 (a)
15 and 103.1 (a) (1) (ii) to withhold the institution
16 of deportation proceedings to permit subject to
17 petition for naturalization.

18 /s/ GKR

19 George K. Rosenberg

20 District Director."

21 No action was taken by the Service upon petition-
22 er's application for naturalization.

23 On March 17, 1964 an O.S.C. and notice of hearing
24 in deportation was served on petitioner, predicated upon
25 grounds that he was never admitted to the United States as
26 an alien for permanent residence and was deportable under

1 the provisions of 241 (a) 1 as being excludable, having
2 effected his entry as an immigrant not in possession of a
3 valid visa in violation of 13 (a) of the Act of May 26,
4 1924.

5 On March 24, 1964 petitioner appeared before a
6 special inquiry officer in propria persona. The Service was
7 represented by its trial attorney. A hearing was thereupon
8 conducted and prosecuted by the Trial Attorney.

9 On April 3, 1964 the special inquiry officer ren-
10 dered his oral decision, determined that petitioner was ex-
11 cludable from the United States at the time of entry, and
12 ordered his deportation from the United States, and denied
13 him any discretionary relief.

14 An appeal was duly perfected to the Immigration
15 Board of Appeals and on May 21, 1964 the Board affirmed the
16 decision of the Special Inquiry Officer and dismissed peti-
17 tioner's appeal. Petitioner, within the time prescribed by
18 law, filed his petition for judicial review with the Ninth
19 Circuit. During the course of proceedings before the Cir-
20 cuit this court ordered, opposed by the Service, that peti-
21 tioner's naturalization proceedings record be filed to aug-
22 ment the deportation proceedings.

23 On April 5, 1965 this court rendered its opinion
24 entitled "Antonio Hector Millan-Garcia vs. Immigration and
25 Naturalization Service, No. 19361," affirming the order of
26

1 deportation and the actions of the Immigration Service relat-
2 ing to Petitioner's application for citizenship. (343 Fed 2d.
3 825)

4 Petitioner thereupon filed his petition for certiorari
5 with the United States Supreme Court. The petition was grant-
6 ed in the matter entitled Antonio Hector Millan-Garcia vs.
7 Immigration Service, 382 U.S.69, dated November 8, 1965,
8 and in a per curiam opinion held and directed:

9 "The motion for leave to proceed in forma
10 pauperis and the petition for writ of
11 certiorari are granted. The judgment is
12 vacated and the case is remanded to the
13 Court of Appeals upon examination of the
14 entire record and in light of the represen-
15 tations of the Solicitor General that the
16 petitioner will be afforded an opportunity
17 to apply for citizenship, and that there
18 will be no deportation proceedings until
19 such determination."

20 Pursuant to the order of the United States Supreme
21 Court and of the above entitled court, petitioner on January
22 31, 1966 filed his Petition for Naturalization with the
23 Immigration and Naturalization Service. On February 17,
24 1966 a preliminary examination was conducted by B. H.
25 Simpson, Naturalization Examiner, at which time petitioner's
26 military record was received in evidence, disclosing his

1 active military service from March 28, 1955 to April 1, 1957,
2 following which period of service he was transferred to the
3 United States Army Reserves, serving therein from April 2,
4 1957 to April 17, 1963 and was honorably discharged.

5 On March 14, 1966 a further examination was held
6 before B. H. Simpson, Naturalization Examiner. At the term-
7 ination of the proceedings, the matter submitted, the exam-
8 iner prepared and filed his findings of fact, conclusions of
9 law and recommendations, denying petitioner's application
10 for citizenship, finding that petitioner "had failed to estab-
11 lish that he is attached to the principles of the Constitution
12 of the United States and favorably disposed to the good order
13 and happiness of the United States", and on the further
14 ground that petitioner "has failed to establish that he can
15 take the oath of allegiance to the United States without
16 mental reservation."

17 The matter came on for hearing before the Hon.
18 Warren J. Ferguson, Judge of the U.S. District Court, for
19 hearing upon petitioner's application for naturalization
20 pursuant to 8 USCA 1447. The hearing was conducted before
21 said court on March 20 and 22, 1967 and was thereupon sub-
22 mitted.

23 On April 13, 1967 in a written opinion, the Dis-
24 trict Court denied petitioner's application for citizenship.
25 The petitioner thereupon perfected his appeal to this
26 Court.

PRELIMINARY STATEMENT

The Supreme Court of the United States, having vacated the judgment of this Court in Millan-Garcia v. Immigration and Naturalization Service, 343 F. 2d at 825 and remanded with the directive affording petitioner an opportunity to apply for citizenship and "that there will be no deportation proceedings until such determination," we verily believe that the denial of petitioner's motion to vacate the Order of Deportation made to the Immigration Service at the time of hearing of petitioner's application for citizenship was contrary to the Supreme Court directive. However, if this court should determine that the deportation hearings and the order of deportation are effective, we do then adopt herein our brief filed with this Court in Millan-Garcia vs. Immigration Service, supra, as part of this brief, and each point, authority and argument raised therein.

STATEMENT OF THE EVIDENCE

Initially the record of the deportation proceedings was received in evidence (Government's Exhibit 3 [RT-p. 8]), over objection by petitioner's counsel (RT, p.8-9); Application for Petition for Naturalization, Exhibit No. 4; Certificate from the Army of the United States, Exhibit No. 2 (RT p.9).

Petitioner Millan-Garcia testified before the District Court that he was born April 27, 1936 in Mexico,

1 brought to the United States by his mother when he was
2 12 or 13 years of age, believed that he was admitted for
3 permanent residence, but later ascertained that he had not
4 been so admitted. He volunteered to be drafted when 18
5 years of age, served actively from March 20, 1955 to April 1,
6 1957 and then was transferred to the Reserves and served in
7 that capacity until the year 1963 when he received his hon-
8 orable discharge. His family resided in the United States
9 and when picked up and confined by the Immigration Service,
10 was advised that he was being given an opportunity to ap-
11 ply for citizenship. He made such application to the De-
12 partment. In the year 1961 he joined an organization called
13 "Fair Play for Cuba" (RT 132-135). His understanding of
14 that organization was to inform people who were concerned
15 with the Cuban regime its goals, "what it was doing" (RT 136).
16 His activities were limited to attending meetings, listen-
17 ing to programs and distributing pamphlets at public meet-
18 ing places. He was a member of that organization for five
19 or six months, this being the extent of his participation
20 (RT 136). When he first joined the organization he believed
21 that Fidel Castro was a leader, not corrupt, who had the
22 desire "to see the social advancement of the people, not
23 only in Cuba but all Latin America." He was never a mem-
24 ber of the Communist or Socialist Party or the Socialist
25 Youth Movement (RT 137). When he first learned that Castro
26 had Communistic tendencies he began to think "very hard

1 about it". When he learned that Castro "if not a
2 Communist, that he had gone too far in his ties with the
3 Soviet Union", he disassociated himself from the organiza-
4 tion. He further testified that:

5 "Q All right. Now, will you tell the court now
6 in detail what your feelings are insofar as the Govern-
7 ment of the United States is concerned; whether or not
8 you are sympathetic to the Government of the United
9 States and whether or not you would uphold the con-
10 stitution of the United States.

11 A I am in favor of this type of government be-
12 cause I think it is more democratic. I am acquaint-
13 ed with the laws and the government of -- somewhat
14 acquainted with the laws and government of Mexico.

15 I have always thought -- or I had thought in the
16 past -- :I have seen many others follow a similar
17 example -- because this is the only way that I can
18 guide my thoughts. I read books on government,
19 they don't help me as much as if I was to present one
20 against the other or weigh one against another.

21 As far as my whole education and environ-
22 ment has been one of an American citizen, or an Amer-
23 ican. I can only see myself as an American.

24 Q Are you willing to uphold the Constitution
25 of the United States?

26 A Yes, I am.

1 Q Is there any mental reservations at all
2 in your mind?

3 A None at all.

4 Q Concerning your being favorably disposed --

5 A None at all.

6 Q Would you bear arms on behalf of the Govern-
7 ment of the United States?

8 A Yes, I would.

9 Q I assume that having borne arms actively and
10 in the Reserves for eight year -- that may mean or
11 be a needless question -- but are you again willing
12 to bear arms on behalf of the Government of the
13 United States?

14 A Yes, I am.

15 Q What has been your education?

16 A Well, my education hasn't been one of steady
17 education. It has been -- it has come in stages.
18 After my mother died in 1952 I discontinued my educa-
19 tion. I was sixteen at the time and started working.

20 I then went into the Service when I was eigh-
21 teen and came out when I was twenty. I proceeded to
22 get my -- acquire my high school diploma. After I
23 had done that I enrolled in junior college and went
24 there for about two years.

25 I dropped out of there for a few years and I
26 have gone back. And that is about the extent of my

1 education." (RT p.139, line 2 through line 23 p.140)

2 The Naturalization Examiner for the Immigration
3 Service then undertook cross examination. He thereupon made
4 inquiry concerning petitioner's marital status. The peti-
5 tioner replied that he was married and was married when
6 the N 400 application for citizenship was filed (RT 141).
7 He stated that he was presently not residing with his wife,
8 but had discussed legal action to terminate the marriage.
9 The Hearing Officer thereupon inquired of the petitioner
10 concerning Miss Rose Uyehara, who had testified on his behalf
11 and his relationship with this witness. Petitioner then
12 answered in the following vein:

13 "Q Mr. Millan, you I believe were present at the
14 time that one of your witnesses, namely, Miss Uye-
15 hara indicated that you had been intimately acquainted
16 during the year 1965. What was your relationship
17 with this witness?

18 A My relationship with her was a close relation-
19 ship. I did ask her to marry me.

20 Q Are you familiar with the term 'adultery'---

21 MR. MARCUS: Now, before --

22 THE WITNESS: You are going too far --

23 MR. MARCUS: Wait just a minute, please. Let
24 me take care of this.

25 Your Honor, unless counsel is prepared to back
26 that up and prove that, I assign this as prejudicial

1 misconduct.

2 THE COURT: Well, I think the way to proceed,
3 Mr. Simpson, would be the court would have to have
4 some type of evidence from you before the court would
5 permit you to proceed along that line." (RT p.142, line
6 23 through line 15, p. 143)

7 After some colloquy between Court and respective coun-
8 sel, the Court overruled petitioner's objection and the
9 witness was asked "have you ever been guilty of adultery? "
10 to which he replied, "No, I have not."

11 When asked if he agreed with Castro's resolution to
12 take over all Cuba during 1962 and 1963, the petitioner
13 replied that "I could see that she was sliding going
14 too far in some of his actions." When asked if he agreed
15 with Castro's resolution to take over all Cuba during 1959
16 and 1962, the witness answered "there were some things that
17 I disagreed with - there were things that I agreed with."
18 (RT-146). He was guided by Castro's speech and what he
19 spoke (RT 146). He agreed with his hopes for a better
20 future for the nations of Latin America. When asked if he
21 subscribed to the theory of Mr. Castro seizing from indivi-
22 dual economic organizations and activities and materials
23 without just compensation, the petitioner testified, "I did
24 not give that too much thought." When asked what he thought
25 about that now, the witness replied, "Well, I think that no
26 government should take somebody's property without proper

1 compensation." (RT 147) The witness testified that he
2 had attended meetings of socialist organizations (RT 149).
3 There were discussions of Marx and Lenin (RT 150). When
4 asked if he agreed with the theory of Marx and Lenin, his
5 response was "not really". The interrogation continued
6 further:

7 "Q Were you, however, at one time in favor of
8 an adoption of certain of these principles in Central
9 and Latin America?

10 A I don't see how I could have been when I
11 stated before that I was in the process of studying
12 these." (RT p.151, lines 15-19)

13 In connection with Nicaragua, the witness stated as
14 follows:

15 "Q Were you at any time, however, associated
16 with a rebel group in Nicaragua?

17 "A As far as I knew the person that I was as-
18 sociated with represented himself as being a mem-
19 ber of a rebel organization.

20 Q And the primary purpose was what?

21 A His primary purpose here was to see if there
22 were any means of getting support for the rebel
23 group.

24 Q To do what?

25 A To overthrow the Government of Nicaragua.

26 Q By force and violence?

1 A If necessary.

2 Q And what was the extent of your participation
3 with this group?

4 A As far as I was concerned it was not a group.
5 It was only an individual.

6 Q And what was the extent of your affiliation
7 with that individual?

8 A The extent of it was that we merely discussed
9 what could be done. And we more or less felt, or
10 went up to people that were sympathetic to the cause
11 to see if they were in favor of such.

12 Q And when was this?

13 A I believe this was in '62 or '61." (RT 152 line 23
14 through line 21, 153)

15 When asked concerning the 26 of July movement,
16 the witness testified it had the same purpose as Fair Play
17 for Cuba. The extent of his participation was none other
18 than to just go to the gatherings and discuss a few current
19 events of Cuba (RT 154, l. 24-25). In these meetings he
20 met a man by the name of Fuega, who claimed that he was a
21 Communist. This person took an active part in the discus-
22 sion of events in Cuba (RT 155). The witness testified that
23 the last time he saw him was in 1962-1963. The examiner
24 thereupon asked the witness concerning his testimony given
25 during the deportation proceedings and asked the witness if
26 he had not been asked the question would he participate in

1 an attack upon Cuba. The witness replied that he had an-
2 swered no, however, his answer now would be yes. He had
3 changed his mind because now it was obvious that "there is a
4 Communist regime in Cuba, whose aim is the same as that of
5 the Soviet Union." (RT 156, lines 24-26. He further testi-
6 fied:

7 "Q Mr. Millan, you have devoted some period of
8 your lifetime recently to studying these matters?

9 A Yes, I have.

10 Q And working these problems out in your own mind?

11 A Yes, I have.

12 Q You did study these problems, these various forms
13 of Government, is that right?

14 A Yes, I have.

15 Q You joined no political organizations, did
16 you?

17 A No, I don't.

18 Q Listen to this question very carefully.

19 Do you believe in the overthrow of the Govern-
20 ment of the United States by force and violence?

21 A No, I don't.

22 Q Are you favorably disposed to the welfare and
23 well being of the Government of the United States?

24 A Yes, I am.

25 Q And will you uphold and defend this Constitu-
26 tion?

1 A Yes, I would.

2 Q Without any mental reservations of any kind?

3 A Without any mental reservations of any kind.

4 Q Are you willing to take the oath of allegiance
5 today?

6 A Yes, I am." (RT, p. 158, line 15 through line
7 15, p. 159.)

8 The petitioner called witness Glen Michael on
9 his behalf (RT 43). He testified that he was employed
10 at North American Aviation Company for a period of six years.
11 His position required security clearance. He was a citizen
12 of the United States by birth, acquainted with Mr. Millan-
13 Garcia for approximately three years. Had seen him at
14 various intervals "sometimes every day" (RT 44). During
15 conversations with Mr. Garcia he discussed with him his
16 affiliation with the government of the United States. He
17 also discussed with him different forms of government.
18 The witness thereupon stated that in his opinion as a re-
19 sult of his conversations the petitioner was well disposed
20 to the government of the United States and believed that he
21 would make a good citizen of the United States.

22 On cross examination, the witness was asked if his
23 talks with the petitioner encompassed Fidel Castro. He was
24 then asked his opinion of Castro's political beliefs. The
25 witness replied "his politics are now known to be of Com-
26 munistic sympathies, at least (RT 46).

1 This witness further testified as follows:

2 "Q When did you first become acquainted with
3 Mr. Millan-Garcia? Was it after or prior to the
4 Bay of Pigs invasion?

5 A I would say it was after.

6 Q Now, at any time since the Bay of Pigs inva-
7 sion, to your knowledge, has he ever participated in
8 or advocated the principles espoused by Fidel Castro?

9 A Not to my knowledge.

10 Q Now, sir, you have indicated your belief that he
11 would be a good citizen of the United States.

12 A Yes, sir.

13 Q Tell us why.

14 A For several reasons. One is I think he is
15 truly concerned with the basic principles upon which
16 our government is constructed, is dedicated to the
17 principles of liberty and individual human freedom.

18 And then as a person I think he has exhibited
19 a strong moral character in supporting himself and
20 pursuing his education and in his general stability
21 of character.

22 Q Did you consider, sir, in formulating your
23 opinion that he would be well disposed toward the
24 Government of the United States, that he served as
25 a member of the Armed Forces of the United States
26 for some eight years?

1 A Yes, I gave that some consideration.

2 Q Is there any doubt in your mind at this time,
3 and during the period of your acquaintance with Mr.
4 Millan-Garcia that he would not be a person well dis-
5 posed toward the Government of the United States and
6 toward making a good citizen?

7 A There is no such doubt." (RT P. 53 1.11 through
8 line 16, p.54)

9 Rose Uyehara testified on behalf of the petitioner.
10 She was an American citizen by birth, 26 years of age, a
11 graduate of Marymount College, taught school in Chicago and
12 in Colombia South America and was currently employed by the
13 County as a social worker (RT 55); that she had a Bachelor
14 of Arts Degree and was studying for her Masters. Her courses
15 included psychology and Spanish. She knew the Petitioner
16 since 1961 or 1962.

17 This witness' testimony is of particular impor-
18 tance because of her personal acquaintance with the peti-
19 tioner, her educational and political background and her
20 connection with and employment by a governmental agency
21 engaged in social service. We particularly refer to her
22 testimony beginning on Page 63, line 2, to Page 65, line
23 4; wherein she testified:

24 "Q Do you agree that a person who becomes a
25 citizen of the United States should be well disposed
26 toward the good order and happiness of the United

1 States?

2 A Yes.

3 Q Do you believe that a person who believes in
4 the principles of Mr. Fidel Castro is such a person?

5 A Do you want 'Yes' or 'No'?

6 Q If it is possible of being answered 'Yes' or
7 'No' but I have no objection if you wish to elab-
8 orate.

9 A I think Mr. Millan has pointed out there are
10 many people within the United States now who at one
11 time felt that Fidel Castro was the best thing that
12 could have happened to Cuba.

13 I don't feel that simply because you agree or
14 disagree with the situation as it stands right now,
15 or after the war, that it doesn't mean you can't be a
16 good citizen.

17 One thing that bothers me so much about this,
18 Mr. Marcus has brought out the fact that Mr. Millan
19 has served in the Army. I don't think this neces-
20 sarily proves that a person is going to be a good
21 citizen, but it bothers me by the fact that in
22 serving in the United States Army Mr. Millan also
23 relinquished his rights as a Mexican citizen, yet
24 did not gain the indulgence of the United States to
25 make mistakes, to have useful ideas, ambitions and
26 hopes and perhaps follow through on these, as anyone

1 else living in the United States has a right to do.

2 You don't go to a person and say, you
3 don't have a good moral character, you have to leave.
4 We don't tell American citizens they have to leave
5 the country or they lose their citizenship.

6 Mr. Millan has lived in the United States
7 a number of years, served in the Army, yet do you
8 give him the right to make mistakes, to have ideals
9 and to try to follow through on them?

10 I think another factor that has to be
11 considered is that, well, boys or girls of his age
12 at a time when they usually become involved in acti-
13 vities such as, you know, Ban the Bomb or, you know,
14 taking a stand on Vietnam or taking a stand on
15 things like this.

16 But I think that what has to be considered
17 is the nature of Mr. Millan's youthful rebellion --
18 however you want to call it -- that it has a different
19 character because of the fact that it came when he
20 was almost grown up from Mexico. I don't think he ever
21 felt fully a part of the United States because with
22 his Latin background it makes this type of thing,
23 this hero-worship of Fidel Castro, the desire to
24 take part in political activities just natural to
25 him, just as it is natural for the youth of today
26 to take a stand on whatever would happen. But

1 because of this background it takes on a different
2 character. I think this has to be understood."

3 (RT, p. 63, line 2 through line 4, page 65)

4 BRIAN H. SIMPSON was called as a witness by peti-
5 tioner and testified that he was the general attorney, em-
6 ployed as Naturalization Examiner for the Department of
7 Justice (RT 76). He was acquainted with Mr. Millan-Garcia's
8 immigration file prior to the time that he conducted the
9 naturalization examination (RT-78). He had discussed the
10 case upon remand from the Circuit with his superior, George
11 K. Rosenberg, District Director of Immigration prior to
12 conducting his examination of the petitioner (RT 78). He
13 was acquainted with the opinion from the Circuit, the Board
14 of Immigration Appeals and the Supreme Court of the United
15 States (RT 79, 84, 85). He had formed no opinion prior to
16 his examination of petitioner whether he was precluded from
17 naturalization. When he read the record up to the time
18 that he had examined the petitioner in pursuance to the
19 application for citizenship he had not determined the veracity
20 of his testimony (RT-85). He predicated his questioning of
21 the petitioner upon the interrogation that had been pre-
22 viously conducted in the deportation proceedings (RT 86).
23 When the petitioner in the Naturalization proceedings under
24 oath stated he would bear arms against any Latin-American
25 Country, that he was well disposed toward the Government of
26 the United States and that he would uphold the Constitution

1 of the United States, the examining officer stated that he
2 did not believe him and had a "substantial doubt" as to his
3 statements in that regard. When he made inquiry of the
4 petitioner whether he believed in the principles of the Cu-
5 ban Government and was advised by the petitioner that he had
6 been "taken in" by joining the Fair Play for Cuba, but upon
7 learning that Mr. Castro was a Communist he severed any
8 connections or ties that he had at the time, he had a sub-
9 stantial doubt concerning the petitioner's statement, yet
10 he believed him when he testified that he was a member of
11 the Fair Play for Cuba. The petitioner had testified that
12 he had never been a member of the Socialist Workers or a mem-
13 ber of the Young Socialist League or any Nicaraguan group
14 (RT 89).

15 As a Naturalization Examiner he had conducted
16 some preliminary examination and interrogation of the peti-
17 tioner prepared findings of fact, conclusions of law and
18 recommendation against naturalization (RT 92). That he is
19 the officer appearing on behalf of the Immigration Service
20 and recommending against citizenship predicated upon his
21 findings and conclusions (RT 83); that regardless of what
22 information he found in the file concerning the deportation
23 proceedings he took an unbiased and unprejudiced view when
24 conducting his investigation.

25 In his statement of findings on page 3 when peti-
26 tioner refused to acknowledge that he believed Castro to be

1 a Communist at the time petitioner was associated with Fair
2 Play for Cuba in the years 1961 and 1962, the Examiner re-
3 quested the Court to take judicial notice of the fact that
4 Castro publicly announced in his speech held in Havana that
5 Cuba was a Community State, patterned after the principles
6 of Marx and Lenin. When asked by petitioner's counsel if
7 he had a copy of such statement by Castro made on December
8 3, 1961, or had shown the petitioner such statement during
9 those proceedings, his reply was, "No, I did not." Nor did
10 he introduce in evidence as part of the proceedings such
11 statement by Fidel Castro (RT 94).

12 When the petitioner made the statement during the
13 course of the examination that he refused to acknowledge that
14 at the time of his association with the "Fair Play for Cuba"
15 group he knew that the Cuban government was communist, he
16 doubted the petitioner's statement (RT 94 and 95).

17 When he conducted his examination he was acting as
18 a legal hearing officer in Naturalization for the Service
19 (RT 95) and that he was presently representing the Immigra-
20 tion Service before the Court, opposed to granting Natural-
21 ization; that he did not reach a final conclusion until he
22 had examined and reviewed the administrative file in deporta-
23 tion and the information contained in the preliminary exam-
24 ination of the petitioner, and thereupon arrived at his
25 recommendation (RT 96). He was aware that there was an
26 outstanding warrant of deportation against petitioner, al-

1 though he denied that he had any knowledge of the directive
2 of Goerge Rosenberg, the District Director, to deny the
3 petitioner his right to process his application for citizen-
4 ship.

5 Yet the District Director, George Rosenberg,
6 present during the Court hearing did stipulate to the follow-
7 ing memo in the file, dated January 23, 1964 regarding the
8 petitioner:

9 "MR. MARCUS: This is dated January 23, 1964
10 regarding Antonio Hector Millan-Garcia. 'The facts
11 in this case do not warrant the exercise of my dis-
12 cretionary authority based on 232(1)(a) and 103(1)(a)
13 (11) in withholding the matter of deportation to
14 permit subject to petition for naturalization."

15 Signed George K. Rosenberg, District Director."

16 (RT p.102, lines 11-17)

17 Although having examined the file and its con-
18 tents he denied knowledge of this directive or that peti-
19 tioner had an application pending for naturalization
20 (RT 104). Thereupon the District Director again interceded
21 and stipulated that the application was on file. When he
22 was thereupon asked concerning the directive of the District
23 Director, the witness testified that:

24 "I at no time gave the directive which you
25 have just indicated to me any consideration
26 whatsoever." (RT 105)

1 He also had knowledge that there was an outstanding effect-
2 ive order of Deportation but denied knowledge that petitioner
3 would be deported. (RT 105) The District Director again
4 interceded in the proceedings, offering to stipulate that
5 the deportation proceedings were initiated on March 17, 1964.
6 The final Administrative Order of Deportation was entered by
7 the Board of Immigration Appeals on May 21, 1964, "had never
8 been withdrawn and was presently outstanding." (RT 109) (Em-
9 phasis added.) He had no reason to doubt petitioner's
10 statement that he had never been a member of the Communist
11 party; he had no reason to doubt the petitioner that he had
12 never been a member of the Socialist Workers Party or of
13 the Young Socialist Alliance organization. He doubted him
14 when he stated that he had severed all connection with the
15 organization known as "Fair Play for Cuba."

16 The following statement of the Naturalization
17 Examiner is particularly important as bearing on his state
18 of mind:

19 "First of all, he stated he was a member of
20 the organization known as Fair Play for Cuba. I
21 have no doubt as to this statement, no.

22 He indicated to me that he severed all
23 connections with this organization at a particular
24 period of time. I don't know as to that. But I
25 had my doubts as to the question.

26 But insofar as the ultimate recommendation

1 is concerned, I was primarily interested in whether
2 or not he was a member of the organization at a
3 particular time, and the extent of his participa-
4 tion in Fair Play for Cuba." (RT 113, lines 1-11)

5 The Examiner again reiterated his position that
6 he was "primarily interested in what he (the petitioner)
7 did when he was a member of "Fair Play for Cuba." When
8 asked to explain the activities of the petitioner when a
9 member of "Fair Play for Cuba" the witness stated that
10 "this petitioner testified to me that he had been instru-
11 mental in distributing pamphlets and other written material
12 - - or at least had advertised meetings when and if they
13 were to be held - - had obtained a movie which was purport-
14 ed by the Castro Government to depict the abortive Bay of
15 Pigs invasion." (RT 117-118)

16 Based upon this activity in exhibiting movies of
17 the Bay of Pigs invasion, "it raised a considerable doubt
18 in my mind as to the veracity of his statement" that he had
19 no knowledge Fidel Castro was a Communist, because "as pre-
20 viously indicated, the entire text of Mr. Castro's speech
21 was printed in the New York Times - -".

22 When the witness was further interrogated about
23 petitioner's oath of allegiance to the Government of the
24 United States when he entered military service the witness
25 testified that he had no personal knowledge of such require-
26 ment. The District Director again interceded and stipulated

1 that it was "customary" to take the oath of allegiance when
2 entering ,military service\ (RT 120).

3 The witness further testified that he found no evi-
4 dence in petitioner's military record or background that he
5 was not loyal to the Government of the United States or had
6 at any time been disloyal, although he volunteered that he
7 found certain activities of the petitioner during his inact-
8 ive reserve enlistment "which raised substantial doubt as
9 to his loyalty." (RT 122) The witness further testified
10 that there was no indication in the petitioner's military
11 record showing a "lack of loyalty."

12 POINTS AND AUTHORITIES RELIED UPON

13 AND

14 ARGUMENT

15
16 THE EVIDENCE WAS INSUFFICIENT TO DENY NATURALIZATION

17
18 Petitioner, a veteran alien, who has served this
19 country for a period in excess of eight (8) years in active
20 and reserve status and was honorably discharged, has asked
21 to be made a citizen of the country to which he has given the
22 best years of his life. Our Government now says that he
23 does not deserve citizenship for the reason that he does not
24 come within the purview of the naturalization law and should
25 be deported from the United States. This position is sham
26 and should not require any extended argument to point up

1 the fallacy and absurdity of the position in which the deci-
2 sion of the lower court has placed the Government of the
3 United States. Is this the reward which the United States
4 desires to bestow upon an honorably discharged veteran, with
5 some eight years of service to the Government? Banishment
6 from the United States, separation from his family, home,
7 relatives and everything that makes life worth living, to
8 a country foreign to him and with which he has no ties,
9 through denial of the privilege of citizenship in this
10 country?

11 During the hearing conducted by the Special Exam-
12 iner on February 17, 1966, he indicated that the scope of
13 the examination on petitioner's application for citizenship
14 "whatever difficulty has occurred in conjunction with law
15 enforcement agencies - - - - and - - - - the issue that was
16 raised insofar as the decision - - - - rendered by the
17 Special Inquiry Officer to allow him or refuse him volun-
18 tary departure. The issue in this case does involve affil-
19 iation, or shall we say, an association with suspected mem-
20 bers of the Communist Party and other organizations that may
21 not be affiliated with the Communist Party. Now this will
22 be the scope of the questioning." (Emphasis added)

23 The hearing was thereupon continued to March 14,
24 1966, At this hearing a motion was made to terminate the
25 deportation proceedings under the ruling and directive of
26 the Supreme Court's decision. Thereupon the examining

1 officer ruled:

2 "The motion is denied on the specific ground, Mr.
3 Marcus, that the only issue which is before me as
4 a Designated Naturalization Examiner at this time
5 is the issue as to whether or not this man is eli-
6 gible for citizenship in the United States, there-
7 fore, that is the only issue to which I will direct
8 my questioning and the only issue upon which I will
9 listen to argument."

10 In Thompson vs. Immigration and Naturalization
11 Service, 332 Fed. 2d. 167, the Circuit reversed the District
12 Court, holding that past membership in the I.W.W. was not
13 sufficient to establish that the alien was not attached to
14 the principles of the Constitution and deposed to the good
15 order and happiness of the United States.

16 "(2) We hold the Findings of Fact of the Examiner
17 adopted by the trial court, and the Conclusions,
18 were clearly erroneous. The Finding as to the I.W.W.
19 is similar to the Finding as to the Socialist Work-
20 ers Party which we disapproved in Seythes v. Webb,
21 7 Cir., 307 F. 2d 905.

22 (3) Thompson's petition for naturalization should
23 have been granted. We therefore reverse and remand
24 with instructions that a certificate of naturaliza-
25 tion issue on the petition heretofore filed by
26 Thompson. Reversed and remanded."

1 In the matter of Seythes v. Webb, 307 F. 2d, 905
2 in deportation proceedings involving membership in the So-
3 cialist Party, the Court, in reversing a deportation order, a
4 determined that the record failed to establish that the
5 Socialist Party advocates and teaches by its Declaration of
6 Principles and Constitution, the violent and forceful over-
7 throw of the Government of the United States within the test
8 laid down by Scales and Noto. Furthermore there is no sub-
9 stantial evidence showing that there is a party line within
10 the organization which advocates or teaches such overthrow.
11 We quote from the opinion:

12 "(2) The crucial question is the correctness of
13 the Board of Immigration Appeals' decision that the
14 Socialist Workers Party is an organization that ad-
15 vocates the overthrow of the Government of the United
16 States by force, violence, or other unconstitutional
17 means. Section 1251 (a) (6) (F) covers membership
18 in an organization that 'advocates or teaches * * *
19 the overthrow by force, violence, or other unconsti-
20 tutional means of the Government of the United
21 States* * *.' We believe it is significant to
22 note that this language and that of a part of the
23 Smith Act, 18 U.S.C. §2385 (the federal criminal
24 statute defining crimes for subversive activities)
25 are practically identical. The Smith Act covers
26 known membership in a 'society, group or assembly

1 by persons' who 'teach, advocate, or encourage the
2 overthrow or destruction' of the United States
3 Government 'by means of violence.'

4 While we recognize the distinction between a
5 prosecution under the Smith Act and a deportation
6 proceeding under Section 1251 (a)(6)(F), the dis-
7 tinction relates not to the subversive character
8 of the organization in question, but rather to the
9 quantum of proof required to convict or to deport.
10 In a Smith Act prosecution the proof must be beyond
11 a reasonable doubt, whereas in a deportation pro-
12 ceeding if the Attorney General's finding is based on
13 'reasonable, substantial, and probative evidence.'

14 Nonetheless, we believe the determination whether
15 an organization is one which advocates or teaches
16 the violent overthrow of the United States Govern-
17 ment ought not be made by a test which is different
18 in a deportation proceeding from that used in a
19 Smith Act prosecution.

20 With this in mind, we believe that the test
21 for deciding the question presented in the instant
22 case must be substantially the same as that laid
23 down in the two cases that have been decided by
24 the Supreme Court under the membership clause of
25 the Smith Act, *Scales v. United States*, 367 U.S.
26 203, 81 S.Ct. 1469, 6 L.Ed. 2d 782, and *Noto v.*

1 United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L. Ed. 2d
2 836. In Noto the Supreme Court said at 297, 81 S.Ct.
3 at 1521:

4 'We held in Yates (Yates v. United States, 354
5 U.S. 298, 77 S.Ct. 1064, 1 L. Ed. 2d 1356),
6 and we reiterate now, that the more abstract
7 teaching of Communist theory, including the teach-
8 ing of the moral propriety or even moral necessity
9 for a resort to force and violence, is not the
10 same as preparing a group for violent action and
11 steeling it to such action. There must be some
12 substantial direct or circumstantial evidence of
13 a call to violence now or in the future which
14 is both sufficiently strong and sufficiently
15 pervasive to lend color to the otherwise ambig-
16 uous theoretical material regarding Communist
17 Party teaching, and to justify the inference
18 that such a call to violence may fairly be im-
19 puted to the Party as a whole, and not merely
20 to some narrow segment of it.

21 'But it should also be said that this element
22 of the membership crime, like the others, must
23 be judged strictissimi juris, for otherwise,
24 there is a danger that one in sympathy with the
25 legitimate aims of such an organization, but
26 not specifically intending to accomplish them

1 by resort to violence might be punished for
2 his adherence to lawful and constitutionally
3 protected purposes, because of other and un-
4 protected purposes which he does not necessar-
5 ily share.'

6 The Supreme Court has stated that it is difficult to
7 attribute a party line to a political organization.
8 In *Schneiderman v. United States*, 320 U.S. 118 at 184,
9 63 S. Ct. 1333 at 1351, 87 L. Ed. 1796, the Court said:

10 'Political writings are often over-exaggerated
11 polemics bearing the imprint of the period and
12 the place in which written. * * * Every utterance
13 of party leaders is not taken as party gospel.
14 And we would deny our experience as men if we
15 did not recognize that official party programs
16 are unfortunately often opportunistic devices
17 as much honored in the breach as in the obser-
18 vance.'

19 (3) Accordingly, we find no substantial evidence in
20 the record that the Socialist Workers Party advocates
21 or teaches by its 'Declaration of Principles and Con-
22 stitution' the violent or forceful overthrow of the
23 Government of the United States within the meaning
24 of the test laid down by *Scales* and *Noto*. Further-
25 more, there is no substantial evidence showing that
26 there is a party line within the organization which

1 advocates or teaches such overthrow."

2 The petitioner testified in this case that he was
3 not a member of the Socialist Workers' Party or the Young
4 Socialist Alliance or was he ever a member of the Communist
5 Party.

6 The District Court relied heavily as authority
7 for the denial of petitioner's application for citizenship
8 on the case of Berenyi vs. Immigration Service, 17 L. Ed. 2d
9 656 - US - 87 S.Ct. - January 23, 1967. The case is not
10 authority for the proposition relief upon. We quote from
11 the opinion:

12 "During the preparation of his application to
13 file a petition for naturalization, the petitioner was
14 asked the following question: 'Have you ever in the
15 United States or in any other place, (a) been a member
16 of, or in any way connected with or associated with
17 the Communist Party either directly, or indirectly
18 through another organization, group or person?' The
19 petitioner, under oath, answered 'No.' On two sub-
20 sequent occasions during the preliminary proceedings
21 on his petition for naturalization, the petitioner
22 again swore that he had never been a member of the
23 Communist Party.

24 At the final hearing before the District Judge,
25 the Government produced two witnesses whose testimony
26 indicated that the petitioner had been a member of

1 the Communist Party in Hungary. Dr. Pal Halasz
2 stated that he had known the petitioner when they
3 were both students at the University of Budapest Medical
4 School and had seen the petitioner attend Communist
5 Party meetings there on one or more occasions.
6 While such meetings were sometimes open to per-
7 sons who were not Party members, and Dr. Halasz was
8 not sure that the petitioner was a Party member, his
9 attendance at Party meetings gave Mr. Halasz the
10 impression that the petitioner was a member. Dr.
11 Gyorgy Kury related that he had attended a study
12 grojp at the University in September, 1948. These
13 groups met to discuss Marxist - Leninist ideology,
14 and students were required to attend regardless of
15 Party membership. One student in each group was
16 responsible for leading the discussion. Dr. Kury tes-
17 tified that at the meeting in question, the petitioner
18 introduced himself as a member of the Communist Party
19 and the student leader responsible for the group's
20 ideological education. Dr. Kury further testified
21 that the petitioner had told the group that he had
22 become a member of the Communist Party after Soviet
23 troops had occupied Hungary in 1945.

24 The petitioner testified that he had never been a
25 Party member or the ideological leader of any student
26 discussion group. He related the heavy pressures on

1 students at the University to attend Party functions
2 and become members, and admitted that these pressures
3 had led him to attend some open Party meetings as a
4 nonmember, but added that he had not been an active
5 participant at these meetings. The petitioner also
6 emphasized his religious upbringing and other factors
7 in his personal life which, he contended, made it un-
8 likely that he would become a Party member. The peti-
9 tioner's wife testified that he had never been a Party
10 member, and four other witnesses stated that while in
11 Hungary and after his arrival in the United States,
12 the petitioner had expressed his strong opposition
13 to the Communist Party and the Communist Regime
14 in Hungary.

15 Basing his decision solely on his own evaluation
16 of the testimony adduced at this hearing, the District
17 Judge concluded that the petitioner had become a Party
18 member in 1945 and had remained a member for an indef-
19 inite number of years, that the petitioner had attend-
20 ed study groups in Communist ideology. Accordingly
21 the court concluded that the petitioner had testified
22 falsely in the preliminary naturalization proceedings,
23 and denied his application for citizenship on the
24 ground that he was, therefore, 'not a person of good
25 moral character within the meaning of the Immigration
26 and Nationality Act.'⁸

1 The petitioner points out that in deportation cases
2 this Court has held that an alien may not be expelled
3 from this country on the ground that he has been a mem-
4 ber of the Communist Party unless his participation in
5 the Party amounted to 'meaningful association.' Rowoldt
6 v. Perfetto, 355 US 115, 2 L. Ed 2d 140, 78 S. Ct. 180;
7 Gastelum-Quinones v. Kennedy, 374 US 463, 10 L. Ed. 2d
8 1013, 83 S. Ct. 1819. He contends that the same rule
9 should apply in the context of naturalization, and
10 that the Government's proof in this case failed to
11 establish 'meaningful association.' But the petition-
12 er's application was not denied because of his Com-
13 munist Party membership. It was denied because, under
14 oath, he did not tell the truth. (Emphasis added.)

15 We cannot say that the District Court was wrong
16 in finding that the petitioner had failed to tell the
17 truth. It follows that the Court of Appeals was not
18 in error in declining to upset that finding.

19 Affirmed."

20 In Berényi, supra, it is readily discerned that
21 petitioner's denial of citizenship was not predicated upon
22 his meaningful membership in a subversive organization or
23 the Communist Party, but that he had sworn falsely before
24 the Naturalization Examiner and before the District Court,
25 which branded him a person lacking in good moral character
26 within the meaning of the Immigration and Nationality Act;

1 that such is not the issue here, nor urged by the Government.
2 It is well to note that in Berenyi, supra, the trial Court
3 found the evidence too weak to establish that the peti-
4 tioner's application should be denied because he had been
5 a member of the Communist Party. The footnote in Berenyi,
6 supra, recites the following:

7 "8. At the same time, the judge found the
8 evidence too weak to establish the Government's al-
9 ternative contentions that the petitioner's applica-
10 tion should be denied because he had been a Party
11 member within 10 years preceding the application for
12 citizenship in 1962, and thus came within §313 of
13 the Act, 66 Stat.240, 8 USC §1424, which provides
14 in relevant part:

15 '(a) . . . no person shall hereafter be natural-
16 ized as a citizen of the United States —

17

18 '(2) who is a member of or affiliated
19 with (d) the Communist or other totalitarian party
20 . . . of any foreign state

21

22 '(c) The provisions of this section shall
23 be applicable to any applicant for naturalization
24 who at any time within a period of ten years
25 immediately preceding the filing of the petition for
26 naturalization or after such filing and before taking

1 the final oath of citizenship is, or has been found
2 to be within any of the classes enumerated within
3 this section, notwithstanding that at the time
4 the petition is filed he may not be included within
5 such classes.'"

6
7 PETITIONER WAS DENIED A FAIR HEARING BY THE
8 NATURALIZATION EXAMINER IN THE PARTICIPATION OF THE
9 NATURALIZATION EXAMINER IN THE PROCEEDINGS BEFORE THE
10 LOWER COURT

11 The Naturalization Examiner prepared his findings,
12 conclusions and recommendations, he prosecuted the case be-
13 fore the United States District Court in opposition to peti-
14 tioner's application for citizenship, he also testified as
15 a witness. His credibility as a witness became an issue,
16 his opinions as to petitioner's eligibility, qualifications
17 for citizenship became an issue; he argued on behalf of the
18 Government; he filed opposing briefs on behalf of the Immi-
19 gration Service. In his capacity as Naturalization Exam-
20 iner he conducted the investigation. His activities en-
21 tailed that of conducting the investigation of petitioner's
22 qualifications, history, background and eligibility; examin-
23 ed the deportation proceedings; sought the introduction of
24 the Immigration Deportation proceedings over objections;
25 testified at the proceedings and cross examined the witnesses
26 offered on behalf of the petitioner.

1 Acting in the capacity of the Naturalization
2 Examiner, he appeared as an investigator, Hearing Officer,
3 Prosecutor and Recommending Judge. Although the learned
4 District Court Judge in his written opinion recited that "the
5 Court has arrived at its judgment independently of any find-
6 ings or recommendations of the Naturalization Examiner," it
7 is naïve to suggest that the Court's decision was not influ-
8 enced by the examiner's investigation, hearings, findings, co-
9 conclusions and recommendations which were all a part of the
10 proceedings and the examiner's active and aggressive partici-
11 pation in the hearings conducted before the District Court.
12 The opinions of the Naturalization Examiner acting as a
13 trial attorney for the Immigration Service were well known to
14 the Court.

15 Thus petitioner was denied a fair hearing before
16 the Naturalization Examiner in light of the entire record.
17 It was compounded in proceedings before the United States
18 District Court where the same Examiner appeared as trial
19 attorney on behalf of the government and further exemplified
20 when he appeared as a witness and testified. We look
21 askance at such proceedings. This procedure denied peti-
22 tioner due process of law for no man, no matter how well
23 intentioned, can act in the dual capacity of an investigator,
24 prosecutor, Judge and juror and accord the accused a fair
25 hearing before the Immigration Service.

26 This Naturalization Examiner was biased and

1 prejudiced against the petitioner. Prior to arriving at a
2 decision in the case he had read and examined the entire
3 Immigration file:

- 4 1. The decision of the Special Inquiry Officer (RT 84);
 - 5 2. The decision of the Board of Immigration Appeals
6 (RT 84);
 - 7 3. The decision of the Ninth Circuit (RT 85);
- 8 and when interrogated before the District Court stated he
9 was acquainted with the record but had reached "no opinion
10 with respect to whether, at that time, this person was pre-
11 cluded from naturalization.) (RT 84, 85, 103). This bor-
12 ders on the ridiculous.

13 The record discloses the directive of the District
14 Director of Immigration, George K. Rosenberg that petitioner
15 be processed for deportation without according him the priv-
16 ilege of processing his application for citizenship (RT-97).
17 Although the Naturalization Examiner denied knowledge of this
18 directive in the file, Mr. George Rosenberg, the District
19 Director, present at the court hearing, stipulated that such
20 directive was in the file (RT 98).

21 Of particular importance is the fact that the
22 Naturalization Examiner discussed the case with Mr. Rosen-
23 berg upon remand from the Circuit to the Immigration Depart-
24 ment by order of the Supreme Court, to process the petition-
25 er's application for naturalization and what position the
26 Immigration Department "would take with respect to the

1 effect of Section 318". (RT 78-79)

2 Indeed this is a most aggravating case, as we
3 have before noted. It does not comport with the concept of
4 American standards of fair play and equal justice. The
5 Naturalization Examiner and the lower Court resorted to a
6 patently erroneous view of the law. To judge the state of
7 mind of the petitioner by the credibility of what he says
8 and the reflection of his inner views by his outward conduct
9 calls for the highest skill and the most careful judgment
10 in making deductions and drawing conclusions to comply with
11 the standards required to become a citizen under the provi-
12 sions of Title I, USCA, Section 1427.

13 Attachment to the principles of the Constitution
14 require as condition for naturalization of an alien accept-
15 ance of fundamental political habits and attitudes which
16 prevail in the United States and willingness to obey the
17 laws which may result from them. It does not mean that one
18 stifle his thoughts, strangle his feelings or shout his
19 allegiance to please the examiner or curry his favor. There
20 was no repudiation of democratic principles, democracy and
21 liberty required by the Constitution to bar petitioner as a
22 citizen of the United States. There was no evidentiary
23 development indicating that petitioner believed in anything
24 of evil design against the Government, although he may have
25 had foolish beliefs, and though interrogated at length in
26 what we would call a "field day" by the Naturalization

1 Examiner, no abstract political theories developed that
2 displayed petitioner's animosity toward or his participation
3 in any conduct that was inimical to the good order and
4 happiness of the United States.

5 Petitioner was seeking knowledge, was attending a
6 State Junior College; his participation in a "Fair Play"
7 organization was not to be decried but to be encouraged.
8 To say the least, the scales of justice and fair play should
9 be balanced in his favor, not to belittle and besmirch his
10 integrity and character by branding him as disloyal to the
11 United States and of immoral character and not sympathetic
12 to the good order and happiness of the United States.

13 His repudiation of the principles of Castro upon
14 learning of his Communistic inclinations were true answers
15 to questions propounded by the Naturalization Examiner and
16 his change of opinion concerning Castro upon learning of his
17 true ideology speaks more for his character and convictions
18 than if he had groveled in contrition and penitence.

19 So we say there was no secret concealment or in-
20 tent to harbor evil designs against the peace, dignity,
21 happiness and well being of the United States. He is being
22 barred from citizenship on purely abstract reasoning while
23 his true ideology produced in his hearing before the District
24 Court goes unheeded.

25 Since the year 1963, the year of petitioner's
26 honorable discharge from the United States Army Reserves,

1 the petitioner has suffered the pangs of belittlement and
2 continued frustration, the accusations of disloyalty and,
3 like the "sword of Damocles hanging over his head" the
4 ever present, constant fear of deportation from the country
5 he has honorably served. The test of his loyalty which the
6 Naturalization Examiner doubted is best exemplified by his
7 proven willingness to give his life for this country. The
8 psuedo super prosecution Examiner has doubted his loyalty
9 and willingness to uphold the Constitution of the United
10 States. If this were true some blemish would have been
11 evident in some manner during the eight years of his service
12 to the Government. The Examiner's doubts are sham and his
13 reasons frivolous. Throughout petitioner's experience
14 with the Immigration Service he has been met with nothing
15 but open hostility and a display of bias and prejudice.
16 Witness, upon his discharge he filed his application for
17 citizenship, given to him as a reward for his military ser-
18 vice, the District Director of Immigration in his inter-of-
19 fice communication addressed to the Naturalization Department
20 expressed his intention that he would not exercise his dis-
21 cretion to permit the permit the processing of the applica-
22 tion, and instructed the officers of the Service to initiate
23 deportation proceedings, which was accordingly done. The
24 petitioner was then prosecuted for deportation by a trial
25 attorney before a Special Inquiry Officer, though petitioner
26 was not represented by counsel. During the proceedings he

1 was never advised of his right to apply for suspension of
2 deportation. He was denied the right to voluntary departure
3 from the United States and any discretionary relief - not
4 informed of his right to apply for citizenship nor fully ad-
5 vised of his statutory and constitutional rights - but order-
6 ed deported after rather perfunctory hearing.

7 Upon appeal to the Board of Immigration Appeals
8 the Order of Deportation was affirmed and appeal dismissed.
9 This Circuit on judicial review affirmed. It was through the
10 grace of the decision of the Supreme Court that he was
11 permitted to process his application for citizenship and
12 that no deportation proceedings were to be had.

13 It is to be noted with emphasis that the District
14 Director's inter-office communication was directed to the
15 same Naturalization Examiner who subsequently conducted the
16 Naturalization proceedings on remand. After discussion
17 with the District Director this same examiner prepared his
18 findings and conclusions recommending against naturalization.
19 This same examiner appeared on behalf of the Government at
20 the hearing before the United States District Court in
21 opposition to the granting of citizenship and vehemently
22 cross-examined petitioner and his witnesses opposed the
23 granting of the petition and during these proceedings openly
24 displayed his bias and animosity, as well as that of the
25 Service, particularly and with emphasis during during the
26 giving of the testimony and opinion concerning the

1 petitioner's loyalty to the United States, his willingness
2 to uphold the Constitution and his opposition toward the
3 good order and happiness of the United States, forgetting and
4 completely casting aside the fact that the petitioner had
5 taken the oath to uphold the Constitution when he entered
6 the Service of the Armed Forces, and served, without a blem-
7 ish on his record, for a period of eight years. One must
8 look with skepticism and dismay at such continued display of
9 hostility and bias, to say nothing of lack of fairness. Is
10 this the reward that the Government of the United States be-
11 stows upon its alien veterans?

12 THE DECISION BELOW

13 THE DECISION OF THE LOWER COURT WAS CLEARLY ERRONEOUS

14 At the very outset of the hearing before the Dis-
15 trict Court, over objection of petitioner's counsel, the
16 Court admitted into evidence the entire deportation pro-
17 ceedings (RT-8).

18 During the hearing before the District Court a
19 colloquy took place between Court and Counsel concerning
20 the interpretation of the Supreme Court's opinion and di-
21 rective. The Service took the position before the District
22 Court that there was an outstanding finding of deportability
23 existing against the petitioner (RT-80).

24 The Court made the following observation:

25 "THE COURT: Is it your position, Mr. Marcus,
26 that the Supreme Court ordered that there be no

1 be no deportation proceedings?

2 MR. MARCUS: Yes, your Honor.

3 THE COURT: That is not my interpretation of
4 the Supreme Court decision.

5 The Supreme Court ordered that the judgment of
6 the Ninth Circuit was to be vacated and the case be
7 remanded to the Court of Appeals. And it says the
8 reason we are making this order, the order was confined
9 solely to the judgment being vacated and the case
10 remanded, was because the Attorney General -- I mean
11 the Solicitor General represented that there would
12 be no deportation proceedings until such determina-
13 tion.

14 Now, these are representations of the Solici-
15 tor General. And it is the order of the Supreme
16 Court, 'That there will be no deportation proceed-
17 ings.'

18 MR. MARCUS: Well, I will accept --

19 MR. ROSENBERG: May I respectfully state
20 that your Honor's position is completely in accord
21 with the subsequent order of the Court of Appeals.
22 They obviously then could not provide a reinstating
23 order if the proceedings had been terminated.

24 That decision said that if this petitioner
25 failed to comply with the order of the Court of
26 Appeals previously entered, it shall be reinstated,

1 and obviously you can't reinstate something that
2 has been terminated."

3 The error of the Trial Court and the position of
4 the Service is evident for Section 1429 of the Immigration
5 and Nationality Act provides that:

6 " * * *Notwithstanding the provisions of section
7 405(b) of this Act, and except as provided in sec-
8 tions 1438 and 1439 of the title no person shall be
9 naturalized against whom there is outstanding a final
10 finding of deportability pursuant to a warrant of
11 arrest issued under the provisions of this chapter
12 or any other Act; and no petition for naturalization
13 shall be finally heard by a naturalization court if
14 there is pending against the petitioner a deportation
15 proceeding pursuant to a warrant of arrest issued un-
16 der the provisions of this chapter or any other Act;
17 Provided, That the findings of the Attorney General
18 in terminating deportation proceedings or in suspend-
19 ing the deportation of an alien pursuant to the pro-
20 visions of this chapter, shall not be deemed binding
21 in any way upon the naturalization court with respect
22 to the question of whether such person has established
23 his eligibility for naturalization as required by
24 this subchapter. June 27, 1952, c. 477 Title III,
25 ch. 2 § 318, 66 Stat.244."

26 This explains quite clearly the reason for and the

1 wording of the directive from the Supreme Court, for if
2 there be an outstanding finding of deportability, the peti-
3 tioner was ineligible for naturalization and the Naturaliza-
4 tion Court was without statutory jurisdiction to naturalize
5 if there "is pending against the petitioner a deportation
6 proceeding." (Title VIII, USCA, Section 1429) The Court,
7 however, proceeded upon the basis that there was a finding
8 of deportability and an Order for Deportation, irrespective
9 of the Mandate and the statutory provision to the contrary.

10 The opinion of the District Court denying the
11 petition for Naturalization quotes extensively from peti-
12 tioner's deportation proceedings. Petitioner's counsel
13 raised objections to the introduction of this evidence and
14 proceedings, which the Court overruled. In justifying its
15 receipt in evidence the Court observed: "The objection
16 is fully answered by the Ninth Circuit in the deportation
17 proceedings and need not be discussed further here."

18 (Millan-Garcia v. Immigration and Naturalization, 343 F. 2d
19 825 (9th Cir. 1965). The Court overlooked the fact that the
20 Supreme Court of the United States vacated the decision of
21 the Ninth Circuit(382 US 69). The opinion of the Circuit
22 was not effective at the hearing nor the "law of the case"
23 or "stare decisis". In support of the trial court's deci-
24 sion he quoted the petitioner's testimony exhaustively from
25 the deportation proceedings and the petitioner's testimony
26 during the hearing conducted before him on March 14, 1966.

1 An examination of the witness' testimony given at this
2 hearing will clearly demonstrate that no evidence was
3 developed that would exclude him from becoming a citizen
4 of the United States. His membership in "Fair Play for
5 Cuba" for a short period of time gave no indication that he
6 was opposed to the principles of the Government of the
7 United States. The petitioner very succinctly explained
8 that he was "taken in" at the inception of Castro's ascend-
9 ancy and in the years 1961 and 1962 with certain principles
10 advocated by him. When he became acquainted with the
11 situation, the ultimate objectives and purposes of the
12 Castro regime he had no further association with them. It
13 can be stated without fear of contradiction that many inno-
14 cent Americans were taken in by the Castro Regime, even our
15 own Government was initially sympathetic to his cause.
16 Disillusionment came to those who sympathized with his ob-
17 jectives when it became apparent what those ultimate objec-
18 tives really were. There is not one iota of evidence in
19 this record that indicates that the petitioner advocated
20 the overthrow of the Government of the United States by
21 force or violence. The mere abstract teaching of Communist
22 theory including the teaching of the moral propriety or
23 even moral necessity for a resort to force and violence is
24 not the same as preparing a group for violent action and
25 steeling it to such action. There is not one scintilla
26 of evidence in this record, direct or circumstantial of any

1 call to violence or violent overthrow of the Government.
2 To bar discussion of the legitimate aims of such an organ-
3 ization, but not specifically intending to accomplish them
4 by resort to violence would be a curtailment of the consti-
5 tutional right of freedom of speech. Not one question was
6 directed by the Naturalization Examiner to elicit from the
7 petitioner what principles of the Communist Party he, the
8 petitioner, had advocated or believed in. It is without
9 conflict and admitted that petitioner was never a member of
10 the Party. Many Universities today have courses in the
11 teachings of Communism. This does not indicate that the
12 teachers or the University advocate or believe in the prin-
13 ciples of the Communist Party. There is no evidence in this
14 record that the membership by the petitioner in Fair Play
15 For Cuba in any way would render him ineligible to citizen-
16 ship for no word of evidence established the aims and pur-
17 poses of this organization. The title "Fair Play for Cuba"
18 should give some suggestion of its true character and pur-
19 pose. Certainly this record is devoid of any evidence that
20 it advocated any principles that were not compatible with
21 the good order and happiness of the United States. In
22 hearings before the District Court the petitioner testified
23 that he would participate in an attack on Cuba because he
24 had since the deportation proceedings learned that the Re-
25 gime of Cuba was Communistic, whose aims were the same as
26 the Soviet Union (RT 158). He further explained his testi-

1 , for which he honorably served for a period of eight
2 years.

3 DATED: January 5, 1968.

4 Respectfully submitted.

5
6 *David C. Marcus*

7 DAVID C. MARCUS
8 Attorney for Appellant
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CERTIFICATION OF COUNSEL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS

DAVID C. MARCUS, being first duly sworn, deposes
and says:

That I am the attorney for the appellant, ANTONIO
HECTOR MILLAN-GARCIA, and I do hereby certify that I have
examined the provisions of Rules 18 and 19 of the above
entitled Court, and that in my opinion the tendered Appel=
lant's Opening Brief, tendered herewith on behalf of the
said ANTONIO HECTOR MILLAN-GARCIA conforms to all require=
ments.

David C. Marcus
DAVID C. MARCUS

Subscribed and sworn to
before me this 8th day
of January, 1968.

Melvin S. Ward
Notary Public in and for
said State.

(SEAL)

My commission expires
August 13, 1971.

1 STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

(PROOF OF SERVICE BY MAIL

ss - 1913a and 2015.5 CCP)

3 I am a citizen of the United States and a resident of
4 the county aforesaid, I am over the age of 18 years and not a
5 party to the within entitled action; my business address is
6 215 West Fifth Street, Los Angeles, 90013 California. On
7 Monday, January 8, 1968, I served the within Appellants Open-
8 ing Brief on the Appellee in said action, by placing a true
9 copy thereof enclosed in a sealed envelope with postage there-
10 on fully prepaid in the United States mail at 215 West Fifth
11 Street, Los Angeles, California addressed as follows:

12 Immigration & Naturalization Service
13 300 North Los Angeles Street,
Los Angeles, California

14 Solicitor General of
15 the United States,
Washington, D. C.

United States Attorney
U.S. Postoffice & Courthouse
Los Angeles, California 90012

16 Clerk of the U.S. Court of Appeals
17 For the Ninth Circuit
18 U.S. Postoffice & Courthouse Building
San Francisco, California, 94101
(Original and 10 copies)

19 I certify under penalty of perjury that the foregoing
20 is true and correct.

21 Executed on January 8, 1968 at Los Angeles, Cali-
22 fornia.

23 *Patricia Allyn Shannon*

24 PATRICIA ALLYN SHANNON
25
26

